APPEAL FROM THE COURT OF APPEALS
(Curtis T. Wilder, Presiding Judge)

---

E. WAYNE RAKESTRAW
SSN: 419-50-3737,

Plaintiff-Appellee,

vs.

GENERAL DYNAMICS CORPORATION,

Defendant-Appellant.
_____/

S Ct No 120996

Ct App No. 237610

WCAC No. 01-0170

LIBNER, VANLEUVEN, EVANS, PORTENGA & SLATER, P.C.
By: John A. Braden (P29645)
Attorneys for Plaintiff
801 W. Norton Avenue, 4th floor
Muskegon, MI 49441
(231) 830-9190

CONKLIN, BENHAM, DUCEY LISTMAN & CHUHRAN
By: Martin L. Critchell (P26310)
Attorneys for Defendant
660 Woodward Avenue, Suite 1010
DETROIT, MI 48226

**PLAINTIFF-APPELLEE'S BRIEF**

**ORAL ARGUMENT REQUESTED**

STATE OF MICHIGAN

IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS
(Curtis T. Wilder, Presiding Judge)

---

E. WAYNE RAKESTRAW,

Plaintiff-Appellee,

vs.

GENERAL DYNAMICS CORPORATION,

Defendant-Appellant.
_____/

S Ct No 120996

Ct App No. 237610

WCAC No. 01-0170

LIBNER, VANLEUVEN, EVANS, PORTENGA & SLATER, P.C.
By: John A. Braden (P29645)
Attorneys for Plaintiff
801 W. Norton Avenue, 4th floor
Muskegon, MI 49441
(231) 830-9190

CONKLIN, BENHAM, DUCEY, LISTMAN & CHUHRAN
By: Martin L. Critchell (P26310)
Attorneys for Defendant
660 Woodward Avenue, Suite 1010
DETROIT, MI 48226

# PLAINTIFF-APPELLEE'S BRIEF

## ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

# INDEX OF AUTHORITIES

## CASES

STATUTES



---

[1] WDCA = Workers Disability Compensation Act, MCL 418.xxx

## SECONDARY SOURCES

*The American Heritage Dictionary of the English Language* (3d ed.) (Boston: Houghton Mifflin Co, 1992) . . . . . 16, 18-20

*Merriam-Webster's Collegiate Dictionary* (10th ed.) (Springfield, Mass.: Merriam-Webster 1993) . . . . . .16, 17, 19, 20

*The Random House Dictionary of the English Language* (unabridged edition) (New York: Random House 1966) . . . . . 16, 17, 19, 20

*Webster's New World Dictionary* (3d College ed.) (New York: Prentice Hall 1994) 16-20

## STATEMENT OF CASE

Plaintiff E. Wayne Rakestraw developed damaged discs in two levels of his neck, and underwent two surgeries therefor (one a disc fusion). Nevertheless, he was asymptomatic when he went to work for Defendant General Dynamics. However, after three years there, he had neck pain severe enough to require mind-numbing medication; additional cervical disc damage; and pain and spondylolisthesis in the low back.

The magistrate refused to find pathologic aggravation, but entered an open award of benefits because the work for Defendant "significantly" worsened Plaintiff's symptoms to the point of disability; which symptoms continued through trial.

The Workers Compensation Appellate Commission affirmed.[2] The Court of Appeals denied leave to appeal.[3] The Supreme Court granted Defendant's application for leave to appeal,[4] which argued that Plaintiff did not suffer a "personal injury."

Plaintiff requests that the Court deny leave as improvidently granted; or, in the alternative, affirm the lower tribunals.

---

[2] 2001 WCACO ____, 15 MIWCLR 1040 (No. 332, Oct. 16).

[3] Ct App No 237610 (January 30, 2002).

[4] Order dated December 10, 2002.

## COUNTERSTATEMENT OF QUESTION PRESENTED

Although Defendant's statement of question presented asks whether symptoms are a personal injury, the body of its brief asks more specifically whether "personal injury" as used in the Workers Compensation Act is limited to "medically identifiable damage to the body of the employee which is distinct from any existing condition" (Defendant's Brief pp. 10, 14, 25).

## COUNTERSTATEMENT OF FACTS

### A. BACKGROUND

Plaintiff E. Wayne Rakestraw (born May 15, 1941; 7[5]) served twenty years in the U.S. Air Force and, upon his retirement, went to work for ITT Computers (8-9, 11-12). Plaintiff began working for Teledyne/Brown Engineering in 1986 (12).

In April, 1991, Plaintiff began experiencing neck pain (13). Plaintiff was diagnosed with two injured neck discs, and underwent a cervical fusion at one level in December, 1991 (13-14).

However, in April 1992, the neck pain returned, this time with a radicular component, so Plaintiff underwent surgery on another disc (14). Plaintiff got good relief from the surgery (16b).

### B. WORK FOR DEFENDANT

Plaintiff began working for Defendant in August, 1996 (15). He was asymptomatic at that time (16b). Plaintiff's job involved 40% sitting, 30% standing, and 30% walking (21b). His job involved supervising 9-10 employees, sitting through meetings, traveling,

---

[5] Following are references used for parts of the record not important enough to be included in the appendices (because concerning only background facts, or facts relating to issues not involved in the appeal):
D= Deposition of defense examiner Paul DeVries, M.D.
R = Deposition of treator Daniel Reichert, M.D.
R+ date = Reichert records attached to his deposition.
Numbers alone = trial transcript

and working on a computer, all of which Plaintiff found stressful (46, 18b-19b, 22b). Plaintiff's neck began bothering him again (20b), especially in the wake of computer work (22b).

C. TREATMENT

By March, 1998, the neck and low back pain were bad enough to cause Plaintiff to seek help from family doctor Daniel Reichert, M.D. (6b; R 3/16/98). Lumbar x-rays showed narrowing at L5-S1 (2b). Although cervical x-rays showed narrowing of the neural foramen at C6-7, there was as yet no radicular pain (3b; R 19). Dr. Reichert began Plaintiff on Naprosyn (R 3/16/98).

By November, 1998, in addition to low back pain, there were right sided complaints (R 20), so Dr. Reichert added Ultram to Plaintiff's prescriptions (R 22).

By March, 1999, Plaintiff was no better and was having difficulty concentrating at work (15b; R 3/3/99), so Dr. Reichert started Plaintiff on a Duragesic patch and ordered an MRI, which showed central disc herniations at C3-4 and C6-7 without impingement on the spinal cord (4b-5b; R 22, 27). Dr. Reichert also obtained a consultation from Kimball Pratt (R 24), who found no operable lesion.

By September, 1999, despite multiple prescription pain medications, the pain was still interfering with Plaintiff's ability to concentrate on his work (6b-8b; R 9/29/99). Plaintiff therefore took 30 days of vacation time, starting on September 29, 1999 (6b, 24b-25b). Plaintiff was now suffering from radicular symptoms, and the neck was worse than

it had been in September, 1998 (24b-25b). Because the Duragesic pain patches interfered with Plaintiff's concentration, he did not return at the end of the 30 days (26b), Dr. Reichert taking Plaintiff off work for good (1b).

D. POST-EMPLOYMENT CONDITION

In January, 2000, after a perfunctory (15-minute) examination (35), Paul DeVries, M.D. pronounced Plaintiff capable of returning to work with heavy lifting restrictions (4a), after which Plaintiff's short-term disability benefits were cut off. Dr. DeVries questioned Plaintiff's pain complaints (D 14), and denied that the abnormalities evident on x-ray had anything to do with his complaints (D 22). DeVries labeled Plaintiff's condition one of the aging process (D 17-18) and (somewhat inconsistently) blamed it on Plaintiff's smoking (D 9-10). While denying that Plaintiff's pain is due to his work for Defendant (D 26), Dr. DeVries admitted that prolonged looking down would "probably" aggravate neck pain (5a). Since the magistrate expressly found DeVries not credible (22a), and such credibility determinations are conclusive on appeal (*Smith v GMC,* 1992 WCACO 977, 980 (No. 326, May 18)), we need not address this doctor's testimony again.

Dr. Reichert saw Plaintiff in August, 2000 (R 8/2/00). Plaintiff was still in pain (9b), and was not significantly aided by Plaintiff's going off work (14b; R 28). Plaintiff suffers from herniated discs (causing central spinal stenosis), postoperative changes, and spondylosis/ degenerative arthritis (6b). Dr. Reichert attributes Plaintiff's continuing

symptoms to the postoperative changes and arthritis (6b). Regarding work contribution, Dr. Reichert testified that "maintaining certain positions certainly could cause pain" (13b).

Dr. Reichert does not consider Plaintiff capable of any full-time work (1b, 10b). Plaintiff himself testified that the pain and inability to concentrate preclude his returning to his former job (38, 39, 40).

E. PROCEEDINGS

After expressly finding Plaintiff to be "a very credible witness' (15a), the magistrate found, as a fact, that, while working for Defendant, Plaintiff suffered symptomatic aggravation of a postsurgical neck (15a, 19a, 21a) but no pathological changes (21a).

The magistrate did not think we were dealing with a condition of the aging process, since a neck changed by surgery is not a condition of the aging process (20a-21a). However, even if we were dealing with a condition of the aging process, the magistrate found that Plaintiff's work "significantly" aggravated Plaintiff's neck symptoms (21a). Specifically, the magistrate noted that Plaintiff made a good recovery from the 1991 and 1992 neck surgeries, and that the only stressors contributing to the neck thereafter were occupational (21a-22a).

Based on aggravation through the last day of work, the magistrate found a September 29, 1999 LDW injury date (13a). The magistrate further found that Plaintiff remains disabled from his prior work (19a).Since the symptomatic aggravation continued through trial, the magistrate entered an open award (15a, 23a).

The Workers Compensation Appellate Commission affirmed (24a). The Court of Appeals denied leave to appeal (31a).

## COUNTERARGUMENT

*STANDARD OF REVIEW:* Divining the meaning of a statute is a question of law, which is reviewable de novo. *Beason v Beason*, 435 Mich 791, 804-805 (1990).

## I. INTRODUCTION

Since its inception, Michigan's Workers Compensation Act has allowed recovery for "personal injury":

> If an employee...receives a *personal injury* arising out of and in the course of employment by an employer who is at the time of such injury subject to the provisions of this act, he shall be paid compensation in the manner and to the extent hereinafter provided...

1912 PA (extra sess.) 10, Pt. 2, Sec. 1 (emphasis added). See, now, WDCA 301(1):

> An employee, who receives a *personal injury* arising out of and in the course of employment by an employer who is subject to this act at the time of the injury, shall be paid compensation as provided in this act (emphasis added).

The Act does not define "personal injury," except in the occupational disease section:

> "Personal injury" shall include a disease or disability which is due to causes and conditions which are characteristic of and peculiar to the business of the employer and which arises out of and in the course of the employment.

WDCA 401(2)(b), added by 1943 PA 245.

This definition is of little use in most cases, since 1) the definition says that occupational diseases are *included* in "personal injury," without saying what a personal injury *is*; and 2) the "definition" sheds only ambiguous light on what constitutes a personal injury.[6]

Lacking a controlling statutory definition, MCL 8.3a comes into play:

> All words and phrases shall be construed and understood according to the common and approved usage of the language; but technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning.

## II. COMMON USAGE

It has been held that, since the Act does not define "personal injury," the common understanding controls. *Cooke v Holland Furnace Co*, 200 Mich 192, 198 (1918). Assuming that it is proper to turn to the dictionary to determine "common usage,"[7] *(Robinson v*

---

[6] For instance, was the definition added in 1943 because the Legislature wanted to clarify that occupational diseases were "personal injuries" all along, or to make a "personal injury" out of something that otherwise wouldn't have been one?

[7] Arguing against dictionary definitions:

1. It is far-fetched to assume that legislators draft legislation with dictionary in hand. On the contrary, since most legislators (or at least most of the subset who actually draft legislation) are lawyers, the meaning most likely to be in legislators' heads, and hence in their intention, are the definitions found in *case law* and *legal* dictionaries. See, in this regard, MCL 8.3a, which recognizes that *legal* definitions may be appropriate for *legal* terms.

2. If we pretended that legislators do have dictionary definitions in mind, it could not possibly be a dictionary published ninety years after the fact. Thus, in construing a 1912 statute (as we are in this case), 1912 dictionaries should be consulted.

*Detroit*, 462 Mich 439 (2000)), the dictionaries do not support the cramped definition Defendant would give to "personal injury."

### A. "INJURY"

Dictionaries define "injury" as follows:

AH:[8] 1. Damage or harm done to or suffered by a person or thing...
2. A particular form of hurt, damage or loss... 3. *Law.*

---

3. Saying "the dictionary" controls begs the question of *which* dictionary. Since (as we shall see) different dictionaries may have significantly different definitions, reference to the dictionary may only introduce ambiguity, while encouraging "dictionary shopping" (such as that engaged in by Defendant in this case).

4. Even within a single dictionary, it is a rare word that does not have more than one meaning. Since being capable of more than one meaning is the definition of ambiguous, resort to the dictionary largely precludes any language being considered "plain," but instead requires us to apply rules of construction.

8

AH= *The American Heritage Dictionary of the English Language* (3d ed.) (Boston: Houghton Mifflin Co, 1992). This dictionary goes to the extreme opposite of RH: it keeps the book short and reduces the number of definitions by providing vague definitions that cover a multitude of sins but provide little real understanding of what a word means.

MW= *Merriam-Webster's Collegiate Dictionary* (10th ed.) (Springfield, Mass.: Merriam-Webster 1993). Definitions in this dictionary are sometimes incorrect.

NW= *Webster's New World Dictionary* (3d College ed.) (New York: Prentice Hall 1994). As evident from the definition of "personal injury," definitions in this dictionary tend to be contradictory or overly specific (ruling out meanings that are in fact encompassed by a word).

RH= *The Random House Dictionary of the English Language* (unabridged edition) (New York: Random House 1966). This dictionary is very reliable, but gives every connotation its own definition rather than using broader definitions that would encompass the varying connotations. In other words, too many definitions.

Violation of the rights of another party for which legal redress is available.[9]

MW: **1a:** an act that damages or hurts: WRONG[10] **b:** violation of another's rights for which the law allows an action to recover damages[11] **2.** hurt, damage, or loss sustained.

NW: 1 physical harm or damage to a person, property, etc. 2 an injurious act; specif., *a*) an offense against a person's feelings, dignity, etc. *b*) loss in value inflicted on a business, reputation, etc. *c*) a violation of rights; wrong

RH: **1.** harm done or sustained... **2.** a particular form or instance of harm... **3.** wrong or injustice done or suffered. **4.** *Law.* any wrong or violation of the rights, property, reputation, etc. of another for which action to recover damages may be made...

Consolidating the foregoing definitions, "injury" is any damage, harm, hurt, loss, offense, injustice or wrong done to a thing, a person, or a person's rights, property, feelings or reputation.

---

9 This definition (as well as MW #1b and RH #4) is incorrect, since there are many injuries for which the law provides neither damages nor redress (see under-threshold injuries in automobile accidents). This illustrates one of the shortcomings of referring to a general dictionary to define a legal term.

10 This definition (as well as NW #2) belies Defendant's claim that an injury refers only to the result and not to the act leading to the result.

11 MW's putting the legal definition ahead of the general one is eccentric, but justified by the fact that the word "injury" is a legal term, coming from the Latin root "jus" or "jur", and thus having the same root as injustice, jurisprudence, jurisdiction, justiciable, jury, etc.

On the specific issue of whether the injury must be tangible or physical, note that only one of the four dictionaries (NW) adds a "physical" harm limitation, and even that dictionary contradicts itself in the very next definition by recognizing that an injury may be to *feelings*. Note also that the dictionaries recognize that a violation of rights (which obviously encompasses more than physical harm) is an "injury." The case law existing when the WDCA was enacted agreed. *Page v Mitchell*, 13 Mich 63, 68 (1864) (false imprisonment a "personal injury"); *May v Wilson*, 164 Mich 26, 28 (1910) (seduction covered by statute referring to "personal injuries").

In short, the "dictionary definition" does not sustain Defendant's claim that "injury" is limited to physical or bodily injury. On the contrary, under the dictionary definitions, any harm (tangible or intangible) is an "injury."

B. "PERSONAL"

That leads to the question of whether the adjective "personal" somehow restricts "injury" to "physical" injury. The dictionaries define personal as follows:[12]

> AH: 1. Of or relating to a particular person; private... 3. Concerning a particular person and his or her private business interests, or activities; intimate... 4a. Aimed pointedly at the most intimate aspects of a person, especially in a critical or hostile manner... 5. Of or relating to the body or physical being.

---

12 To save space, we omit clearly irrelevant definitions of "personal," such as "done in person."

MW: 1: of, relating to, or affecting a person: PRIVATE, INDIVIDUAL... 3: relating to the person or body 4: relating to an individual or an individual's character, conduct, motives or private affairs often in an offensive manner.

NW: 1 of or peculiar to a certain person; private; individual... 3 involving persons or human beings 4 of the person, body, or physical appearance... 5 *a*) having to do with the character, personality, intimate affairs, conduct, etc. of a particular person... *b*) tending to make personal, esp. derogatory, remarks... 6 of, like, or having the nature of a person, or rational, self-conscious being...

RH: 1. of, pertaining to, or coming from a particular person; individual; private... 2. relating to, directed to, or intended for a particular person... 3. referring or directed to a particular person in a disparaging or offensive sense or manner... 4. making personal remarks or attacks... 6. pertaining to or characteristic of a person, or self-conscious being... 7. of the nature of an individual rational being. 8. pertaining to one's person, or bodily aspect.

Though one dictionary (AH #5) contains a definition that treats "personal" as synonymous with "bodily," that is only one of several definitions. The other definitions recognize that "personal" encompasses not only the person's body, but also the person's character, personality, interests, conduct, activities or affairs. Moreover, the equivalent definition in other dictionaries (MW #3, NW #4, RH #8) define "personal" as relating to a person *or* his body, thus recognizing that "person" is broader than "body."

The definitions of "person" bear out the latter assertion[13].[14]

AH: 1. A living human being... 2. An individual of specified character... 3. The composite of characteristics that make up an individual personality; the self. 4. The living body of a human being... 5. Physique and general appearance. 6. *Law.* A human being or an organization with legal rights and duties.

MW: **1.:** HUMAN, INDIVIDUAL... **4a** *archaic*: bodily appearance **b:** the body of a human being... **5:** the personality of a human being: SELF **6:** one (as a human being, a partnership, or a corporation) that is recognized by law as the subject of rights and duties...

NW: 1 a human being... individual man, woman or child... 3 *a*) a living human body *b*) bodily form or appearance 4 personality; self; being... 7 *Law* any individual or incorporated group having certain legal rights and responsibilities

RH: **1.** a human being, whether man, woman or child... **2.** a human being, as distinguished from an animal or thing **3.** *Sociol.* an individual human being, esp. with reference to his social relationships and behavioral patterns as conditioned by his culture. **4.** *Philos.* a self-conscious or rational being. The actual self or individual personality of a human being... **6.** The body of a living human being... **7.** The body in its external aspect... **11.** *Law.* a human being...or a group of human beings, a corporation, a partnership, an estate, or other legal entity... recognized by law as having rights and duties.

---

[13] Reference to the definitions of "person" is also needed because dictionaries often use "person" in their definitions of "personal."

[14] To save space, we omit clearly irrelevant definitions of "person," such as "a role in a play."

Thus, "person," like "personal" has multiple meanings, some relating to the body, some relating more broadly to the self.

Pulling the definitions together, "personal" simply means "relating to the person;" while "person" is everything that goes into being human: the body, the personality, the self. To say (as Defendant does) that "person/personal" relates only to the physical amounts to picking one definition out of many, and a definition that is contradicted by several other dictionaries to boot.

C. CONCLUSION

While "injury" and "personal" obviously *encompass* physical harm to the body, to *limit* it to that would require us to a) ignore three out of four dictionaries and b) even within the fourth dictionary, elevate one definition to the exclusion of the others. No objective quest for legislative intent can countenance such tactics.

Looking at the definitions as a whole, "injury" is any harm (to the body or feelings), while "personal" simply limits the harm to the individual, in contradistinction to harm to an animal or to things. *May v Wilson*, *supra* at 164 Mich 28:

> A personal wrong or injury is an invasion of a personal right. It pertains to the person, the individual...as contradistinguished from injuries to property.

By this definition, since pain is harm to a person's feelings, it is a "personal injury."

If there be doubt about this, that would simply mean that the phrase is ambiguous, which would require resort to rules of construction; which is where we turn next.

## III. RULES OF CONSTRUCTION

If it is concluded that the meaning of "personal injury" is ambiguous, that would bring rules of statutory construction into play. The most pertinent is the rule that remedial legislation is entitled to a broad and liberal construction.

The Workers Compensation Act is a remedial statute, meant to do away with common-law limitations that had permitted employers to injure employees with impunity:

> We once lived in... a veritable legalistic Garden of Eden, so completely out of touch with the realities of industrial life that those who came before us for succor, the halt and the blind, the victims of industrial accidents, were almost invariably turned away empty handed. It was the reaction of our people to these unrecompensed injuries that found expression in the workmen's compensation acts. A philosophy that is today no longer new demanded that the product pay its own way, that the human material consumed in its manufacture be purchased with the same coin as the coal and iron ore going into its production.

*Crilly v Ballou,* 353 Mich 303, 307 (1958). The Act is therefore entitled to a liberal construction, with ambiguities resolved in favor of compensability. *Deziel v Difco Laboratories*, 403 Mich 1, 33-35 (1978).

Since a reasonable (let alone liberal) definition of "personal injury" encompassed all harm to the person, emotional as well as physical, the rules of construction do not support the niggardly construction Defendant would impose on the phrase.

## IV. EXPERIENCE UNDER THE ACT

### A. INTRODUCTION

So far, we have seen that both the dictionary definitions and applicable rules of construction would include pain/injury to feelings within "personal injuries" under the Workers Compensation Act. That should be enough to dispose of the case, since even if there were a case directly supporting Defendant's definition, it cannot stand against the plain language of the statute and/or established rules of construction. *Sington v Chrysler Corp*, 467 Mich 144 (2002) (judicial precedent will not be followed if it contradicts statutory language).

However, for the sake of completeness, we will examine the case law and subsequent amendments for whatever light they can shed on the meaning of "personal injury."

At the outset, we should note that the Michigan courts have tended to eschew attempts at formulating general definitions of "personal injury," instead letting their dispositions of specific cases flesh out the concept.[15]

### B. NONTRAUMATIC CONDITIONS

The ink was barely dry on the Workers' Compensation Act before the Court, noting the many references to "accidental" personal injury (most prominently, in the title

---

[15] An exception is *Marman v Detroit Edison Co*, 268 Mich 166 (1934), discussed *infra* under diseases.

of the Act), held that only "accidents" (meaning unforeseeable injuries) were compensable. Under this regime, gradually developing or foreseeable conditions were not compensable, not because they weren't "personal injuries," but because they weren't "accidental."[16]

Conversely, where a condition arises suddenly and without warning, the "accident" requirement was satisfied, and the disability was compensable, *even if it little or no physical trauma was involved.*

Thus, in *Sherman v Winkelman Bros Apparel,* 262 Mich 214 (1933), a worker who developed a skin rash from handling furs with irritative dye was held to have met the "accidental injury" requirement, even though all that was involved was an allergic reaction.

Similarly, in *Curley v Beryllium Corp*, 278 Mich 23 (1936), lung irritation from unexpected exposure to beryllium gas was held compensable, even though the bodily changes occurred at a microscopic level.

In *Cazan v Detroit,* 279 Mich 86 (1937), a worker who was overcome by carbon monoxide and then developed a neurosis was found entitled to compensation, even

---

[16] The "accident" requirement was productive of much litigation. When the Legislature deleted most (but not all) references to "accidental" injury in 1943, the Court split on whether the requirement still existed. See *Croff v Lakey Foundry*, 320 Mich 581 (1948) (4-4 split). The requirement hung on until 1969, when the last references to "accidental" were removed from the Act.

though the only "injury" was mental and/or temporary interference with exchange of gasses in the lungs.

Finally, in *Rainko v Webster-Eisenlohr,* 306 Mich 328 (1943), cigar workers smelled gas, became dizzy and fainted and the plaintiff developed a neurosis from the incident. The Court held that this was a compensable accidental injury, though, like *Cazan,* the only injury was mental and/or temporary interference with consciousness.

Pain is usually[17] a result of physical changes, albeit on a microscopic level: irritated tissues swell, causing them to press on nerves, which send electrochemical signals to the brain, which interprets the signals as pain. If the mere fact that the changes are microscopic or temporary were enough to negate their being "personal injuries," then *Curley, Cazan* and *Rainko* would have to be overruled.

C. NEUROSES

The compensability of neuroses was addressed not long after the Act took effect. In *Schroetke v Jackson-Church Co,* 193 Mich 616 (1916), a worker who experienced fright and exertion while trying to quell a blaze later suffered a heart attack. While the existence of the heart attack renders moot the question of whether the shock alone would constitute a personal injury, the Court relied on two English cases that had awarded workers compensation despite lack of any physical injury. *Yates v S Kirby etc Colleries,* 3

---

[17] An exception is truly psychosomatic pain, which is best analyzed like a neurosis, which it is.

BWCC 418 (collier disabled by shock at removing severely injured minor suffered a "personal injury"); *Pugh v Ry Co*, 2 QB 248 (1896) (worker disabled by stress of having narrowly averted a train accident suffered a "personal injury").

The Court embraced the rule of *Yates* and *Pugh* by more than *dictum* in *Klein v Darling Co*, 217 Mich 485 (1922). In that case, a worker who "went off the deep end" after accidentally dropping a radiator on a coworker's head was held to have suffered an accidental injury, even though the worker suffered no physical trauma at all.

What was implicit in *Klein* (that a purely mental injury is nevertheless an injury) was made explicit in *Carter v GMC*, 361 Mich 577 (1960) (worker who suffered mental breakdown from inability to keep up with assembly line entitled to compensation).

*Carter* was followed by *Deziel v Difco Laboratories, supra* at 403 Mich 25, a case remarkable in that the Court was *unanimous* in recognizing neurosis as a "personal injury." As Justice Coleman put it, "mental injuries are no less genuine than physical injuries" (at 403 Mich 59).

Neuroses are the ultimate in "symptomatic aggravation," in that they are *all* symptoms: except in the exceptional case of organic brain damage, neuroses involve zero physical injuries, even on a microscopic level. If psychic injury, unaccompanied by any physical insult, is a "personal injury," then perforce so is pain resulting from a physical injury (what the Plaintiff suffered in the case at bar).

Recognizing that the mental disability cases render its definition of "personal injury" untenable, Defendant argues that *Carter* and progeny should be overruled. However, the notion that "personal injury" is not limited to "gross physical harm" did not start with *Carter,* but instead is supported by a line of cases beginning with *Dove* (1917), going on to *Klein* (1922) and *Carvey* (1922), including *Frankamp* (1923), *Beaty* (1928), *Sherman* (1933), *Curley* (1936), *Cazan* (1937) and *Rainko* (1943). Limiting the definition as Defendant would wish would require overruling those cases as well.

## D. DISEASES

### 1. Early Cases

Most diseases, like pain, involve no trauma, except on a microscopic level. However, that fact did not prevent the Court from recognizing the compensability of diseases in a number of cases.

Thus, in *Blaess v Dolph,* 195 Mich 137 (1917), disability from a strep infection was covered, where a worker handled an infected body, despite no proof that the cut by which the organism gained entry was sustained on the job. In other words, the injury was the infection itself.

Similarly, in *Dove v Alpena Hide & Leather Co,* 198 Mich 132 (1917), a worker who contracted a fatal septic infection from breathing in dust from infected hides was found to have suffered an accidental injury. Since the Act has always required that death result

from a "personal injury" (see, now, WDCA 321), it is evident that the personal injury in *Dove* was the contracting of the infection.

Last, in *Frankamp v Fordney,* 222 Mich 525 (1923), a worker who contracted typhoid from water at work was held to have suffered an accidental injury.

This is not to say that diseases were always compensable. As noted, the Act used to require that injuries be "accidental," and the compensability of diseases sometimes foundered on that requirement. *Basil v Butterworth Hospital,* 272 Mich 439, 444 (1935) (scarlet fever contracted by hospital worker not "accidental"). Nor is a disease compensable absent a *causal relationship* between it and the job. *Marman v Detroit Edison Co, supra* (no evidence that work contributed to status lymphaticus that killed worker). This renders *Marman's* discussion of "personal injury"[18] of dubious relevance, since *Marman* was concerned less with the nature of the injury than with whether the work contributed to it.

---

[18] "Personal injury implies something more than changes in the human system incident to the general process of nature or existing disease or weakened physical condition. The term, as employed in the compensation act, contemplates some intervention which either produces a direct injury or so operates upon an existing physical condition as to cause an injurious result, reasonably traceable thereto." *Marman* at 268 Mich 167. In other words, "changes in the human system" due to disease are not compensable unless the work "intervenes" to cause an "injurious result." *Marman* did not say what the injurious result might be, but the cases we've discussed show that infection, tissue irritation, neurosis and syncope are all "injuries."

2. Statute

Evidently unhappy with the courts defining "accidental injury" so narrowly as to exclude occupational diseases, in 1937 the Legislature added Part VII to the Act, containing a schedule of compensable occupational diseases. 1937 PA 78.

Evidently considered too complex and arbitrary, the schedule was replaced in 1943 with a definition of "personal injury" that included "occupational diseases." At the same time, compensation for "ordinary diseases of life" was excluded altogether:

> "personal injury" shall include a disease or disability which is due to causes and conditions which are characteristic of and peculiar to the business of the employer and which arises out of and in the course of the employment. Ordinary diseases of life to which the public is generally exposed outside of the employment shall not be compensable... [19]

Since compensability of diseases now turned on whether they were "occupational" versus "ordinary," and not whether they were "personal injuries" (since an occupational disease was by definition a "personal injury"), post-1943 disease cases are not particularly relevant to the latter question. However, by 1943 the case law had established that, under the commonly understood definition of "personal injury" (as opposed to the special definition added in 1943), diseases are "personal injuries," though the injury be microscopic, and despite lack of any visible trauma. Such cases therefore contradict any claim that gross or visible trauma is required for a "personal injury."

---

[19] This language is identical to the current act. See WDCA 401(2)(b).

## E. CIRCULATORY SYSTEM

### 1. Early Cases

Consistent with the disease cases, the pre-1943 cases involving the circulatory system recognized that, so long as it is "accidental," a disabling physiological change is compensable, despite lack of physical trauma.

Thus, in *Carvey v W.D. Young & Co*, 218 Mich 342 (1922), a worker with preexisting arteriosclerosis lost his balance on a bicycle at work, grabbed onto some boards, but fell anyway. He later developed paralysis on one side, diagnosed as coming from a stroke, which could have been caused by the attempt to stop his fall. The "accident" requirement having been met, the case was found compensable, even though the plaintiff suffered no blow, and even though the bodily changes consisted only of a change in blood flow that starved his brain of needed oxygen.[20]

In *Beaty v Foundation Co,* 245 Mich 256 (1928), a caisson worker suffered "the bends" from improper regulation of air pressure, and died later in the day. The "accident" requirement having been met, the case was found compensable, despite no trauma, and even though the disabling condition was nothing more than pressure changes in bodily

---

[20] *Cf. Weinmann v GMC*, 152 Mich App 690 (1986), lv den 426 Mich 860 (1986) (affirming WCAB denial based on fact that angina was produced by work exertion that "merely" increased demand for blood). Since that is the same physiological change that produces strokes, syncope, and heart attacks, it is evident that *Weinmann* cannot be reconciled with Supreme Court authority.

fluids. Since[21] death cases are not compensable absent an antecedent personal injury, the case necessarily stands for the proposition that contracting the bends is a personal injury.[22]

### 2. Occupational Disease Amendments and *Kostamo*

Insofar as circulatory problems are due to disease, the occupational disease amendments limited such cases. In particular, since arteriosclerosis is an ordinary disease of life, and the 1943 amendments exclude ordinary diseases of life, disability resulting from arteriosclerosis would not be compensable, *whether or not* it would otherwise be a "personal injury."

That was the import of *Fiszer v White Pine Copper*, 1974 WCABO 3536 (No. 554, Dec. 11) and *Hannula v Cleveland-Cliffs Iron Co*, 1974 WCABO 3680 (No. 571, Dec. 19). In both cases, it was held that a worker who suffered chest pains/angina from arteriosclerosis, but no heart attack/ physical heart damage was not entitled to compensation. The WCAB said in *Fiszer*,

> An evaluation of the evidence fails to confirm the Referee's determination that plaintiff's disability arose out of and in the course of his longtime employment with defendant. It is more persuasive that plaintiff suffers from an ordinary disease of life. (See Chapter 4 of the Act)...

---

[21] as noted in connection with *Dove v Alpena Hide & Leather Co*, *supra*.

[22] For ease in reference, a table collecting the compensable cases is attached.

> The visceral question in the instant case is: Was documented arteriosclerosis caused or aggravated by Plaintiff's employment?...
> Clearly, the work performed by plaintiff for defendant did not cause hardening of coronary arteries, nor is there reasonable evidence work plaintiff performed for defendant aggravated the underlying pathology. Again, it is apparent this serious ailment followed its treacherous course and resulted in disability. (At 1974 WCABO 3536, 3543).

In sum, the WCAB held that, because the work did not cause nor aggravate Fiszer's arteriosclerosis, the arteriosclerosis was an ordinary disease of life, not an occupational disease, hence not compensable *under chapter 4*. Note that *Fiszer* did not address whether the plaintiff suffered a "personal injury" *under chapter 3*.

Similarly, in *Hannula*, the WCAB stated,

> Plaintiff has arteriosclerotic heart disease. At issue is whether his work aggravated that condition to disability (i.e., worsened the condition, or simply caused transient angina pains)...
> We here find plaintiff has one of the "ordinary diseases of life," which Chapter 4, Section 401 of the Act, precludes from coverage. We find no work aggravation of that disease (at 1974 WCABO 3680, 3684).

Like *Fiszer, Hannula* held that there was no compensable *chapter 4* claim and did decide whether the plaintiff suffered a "personal injury" under chapter 3.

The Supreme Court affirmed *Fiszer* and *Hannula*, saying,

> The workers' compensation law does not provide compensation for a person afflicted by an illness or disease not caused or aggravated by his work or working conditions. Nor is a different result required because debility has progressed to the point where the worker cannot work without pain or

> injury.[23] Accordingly, compensation cannot be awarded because the worker may suffer heart damage which would be work-related if he continued to work. Unless the work has accelerated or aggravated the illness, disease or deterioration and, thus, contributed to it, or the work, coupled with the illness, disease or deterioration, in fact causes an injury, compensation is not payable.
>
> Arteriosclerosis is an ordinary disease of life which is not caused by work or aggravated by the stress of work. However, stress that would not adversely affect a person who does not have arteriosclerosis may cause a person who has that disease to have a heart attack.
>
> The WCAB found that *Fiszer* and *Hannula* had not suffered heart damage. Those findings are supported by the evidence. Therefore, whatever the stress of the jobs, there was no injury. Since stress does not aggravate arteriosclerosis, the WCAB decisions denying them compensation must be affirmed. Although there is a causal relationship between the underlying disability, arteriosclerosis, and Fiszer's and Hannula's inability to continue working, that disability was not caused and could not have been aggravated by their employment.

*Kostamo v Marquette Mining Co*, 405 Mich 105, 116, 118 (1979).

Although one could lift some of the quoted language out of context in an attempt to create a "pathological aggravation" requirement,[24] the context of *Fiszer* and *Hannula*

---

[23] Note that this sentence implicitly recognizes that pain may be debilitating/disabling; but notes, obviously enough, that disability alone is insufficient: the work must have *caused or contributed to* the disability.

[24] The same could be said of language in *Farrington v Total Petroleum*, 442 Mich 201, 216 (1993). However, the Court's reference there to "the requirement that claimants prove that the alleged cardiac injury resulting from work activities went beyond the manifestation of symptoms of the underlying heart disease" could simply mean that

was an ordinary disease of life, excluded by virtue of what is now WDCA 401(2)(b). Consequently, even if *Kostamo* were read as creating a pathological aggravation requirement, it would apply only to diseases, and then only to nonoccupational, ordinary diseases of life. *Kostamo* did not involve, and consequently was not called on to decide whether "personal injury" in general (i.e., apart from the special definition in WDCA 401) covers nontangible harm *not* related to a disease.

Moreover, reading *Kostamo* as creating a pathological aggravation requirement would contradict the plain language of the ordinary disease of life exclusion which was construed by *Kostamo*:

> An ordinary *disease* of life to which the public generally is exposed outside of the employment *is not compensable.* (Emphasis added)

The language makes clear that the *disease itself* is not compensable (which is why disability caused solely by arteriosclerosis is not compensable). However, it would be going beyond the language of the statute to say that the *effects* of the disease *brought on by work activities* are not compensable. Even if one were to consider the language ambiguous enough to permit such a construction, rules of construction (such as resolving ambiguities in favor

---

symptoms are compensable, if *caused by the work* in addition to the underlying disease. Moreover, having affirmed an award of benefits to a worker who suffered heart damage, whatever the Court said about compensability of a case *not* involving heart damage was unnecessary to the decision, hence *dictum. Mattison v Pontiac Osteopathic Hosp*, 242 Mich App 664, 672-673 (2000).

of coverage when construing a remedial statute like the Workers Compensation Act) would forbid such a reading.

Finally, reading *Kostamo* as creating a pathological aggravation requirement would make the *Kostamo* Court guilty of the same error committed by the Court of Appeals in *Wilkinson v Lee,* 463 Mich 388 (2000). That was an automobile tort case in which the Court of Appeals had held that, because a whiplash injury did not worsen the pathology of a brain tumor, increased symptoms in the wake of the injury were not recoverable. The Supreme Court rejected that reasoning as follows:

> The majority erred in focussing on the underlying brain tumor as the "basic injury" involved in the case. Regardless of the preexisting condition, recovery is allowed if the trauma caused by the accident triggered symptoms from that condition (at 463 Mich 395).[25]

In other words, the tortfeasor was liable, not merely for contributing to the underlying condition (the brain tumor), but also (or instead) for contributing to the *effects* of the brain tumor. By this reasoning, that work does not contribute to underlying arteriosclerosis is not fatal to a workers compensation claim, so long as the work contributes to the disabling effects of the arteriosclerosis (e.g., chest pain).

---

[25] The same error was committed by the Court of Appeals in *Weinmann v GMC, supra*, the panel focussing on the nonoccupational nature of the underlying disease to the exclusion of the work contribution to the disabling pain.

Finally, reading *Kostamo* as creating a pathological aggravation requirement would make *Kostamo* inconsistent with a long line of cases (already discussed) that have awarded compensation despite no pathological worsening. See especially the neurosis and syncope cases. If *Kostamo* had intended to overrule that line of cases, one would expect the Court to have at least mentioned them.

To recapitulate, reading *Kostamo* as creating a pathological aggravation requirement would

- create a conflict between *Kostamo* and *Wilkinson v Lee* (which held that it was error to ask only what caused the underlying condition while ignoring the question of what caused the symptoms as well);
- extend the ordinary disease of life exclusion beyond a proper construction of the language used; and
- create a conflict between *Kostamo* and the long line of prior cases that recognized the compensability of disabling harm, regardless of whether any tangible or pathological injury could be proven

These untoward effects can be avoided by recognizing that *Kostamo* merely held that the ordinary disease of life exclusion applies where the work contributes *neither* to the underlying disease *nor* to its effects; and that the case is therefore compensable if the work contributes *either* to the underlying disease *or* to its effects.

## V. THE LEGISLATURE'S RESPONSE

Before *Kostamo,* the law relating to nonphysical injuries was relatively uncomplicated: because "injury" is not limited to physical injury, any disabling condition (whether allergy, irritation, syncope, disease, "the bends," or neurosis) was compensable, without any need to prove trauma. *Kostamo* complicated the picture, at least in vascular cases, by holding that, a) while disabling heart damage is a compensable injury, b) disabling arteriosclerosis is not compensable because of the ordinary disease of life exclusion. *Kostamo* was ambiguous whether the *effects* of arteriosclerosis (i.e., angina) are compensable. Clearly they are not if due *solely* to the nonoccupational disease, but *Kostamo* was less clear on compensability where work activities *concur* to produce disabling angina.

The Legislature responded to *Kostamo* and *Deziel* by adding WDCA 301(2) to the Act:

> Mental disabilities and conditions of the aging process, including but not limited to heart and cardiovascular conditions, shall be compensable if contributed to or aggravated or accelerated by the employment in a significant manner. Mental disabilities shall be compensable when arising out of actual events of employment, not unfounded perceptions thereof. 1980 PA 317, eff. Jan. 1, 1982.[26]

---

[26] Identical language was added to WDCA 401(2)(b).

The amendment renders moot the question of whether *Kostamo* precluded recovery for anything less than physical heart damage since, even if *Kostamo* had so held, the statute supersedes any such rule. Note that 301(2) does not say that heart *damage* or heart *attacks* shall be compensable, etc. Instead, it says that "heart and cardiovascular conditions" shall be compensable. A "cardiovascular condition" is broader than a heart attack, encompassing even the arteriosclerosis *Kostamo* claimed was not compensable. Note, moreover, that the heart and cardiovascular conditions to which WDCA 301(2) refers are classified as "conditions of the aging process." Since a heart attack is not itself a condition of the aging process, whereas arteriosclerosis is, it is plain that WDCA 301(2) contradicts any claim that only actual heart attacks or only heart damage are compensable.[27]

---

[27] Defendant argues that, because WDCA 301(2) does not expressly define "personal injury," it leaves intact a rule that anything short of heart damage is not a personal injury, hence not compensable. However, as we have seen, there was in fact no rule that anything short of heart damage is not a personal injury. On the contrary, a number of conditions falling short of tangible injury have been found to be personal injuries; and the only reason the effects of arteriosclerosis had not been compensable is because of the exclusion for ordinary diseases of life; an exclusion that is not properly extended to effects of arteriosclerosis *to which work activities contribute.*

Moreover, denying compensation for anything less than heart damage would transform WDCA 301(2)'s language that heart *conditions* (and not mere heart *damage*) *"shall be compensable"* if significantly aggravated into cant. It is settled that all parts of a statute are to be given effect if possible, and none treated as surplusage. *Danto v Board of Medicine,* 168 Mich App 438, 442 (1988).

By stating that "mental disabilities...shall be compensable," WDCA 301(2) also represents legislative endorsement of the view (expressed in *Klein/Carter/Deziel)* that neuroses are compensable (while at the same time erecting a higher causation hurdle in such cases).

By allowing (while simultaneously limiting) recovery for mental disabilities (in which there is no physical injury) and for heart "conditions" (and not merely heart damage), the Legislature implicitly endorsed the view that a condition need not be physical or tangible to be compensable. Indeed, since imposing a physical injury requirement would render WDCA 301(2) a dead letter (at least as to neurosis cases), the courts are no longer free to impose a physical injury requirement.

## VI. CONSEQUENCES OF DEFINITIONS

### A. INTRODUCTION

Strictly speaking, the consequences of the possible definitions are immaterial, since the courts' duty is to apply statutes as written, let the chips fall where they may. This is so even if the construction leads to results some would label absurd (the remedy in that case lying with the Legislature). *Dibenedetto v West Shore Hospital*, 461 Mich 394, 402 (2000); *Robertson v Daimlerchrysler Corp*, 465 Mich 732, 758 (2002).

Nevertheless, for the sake of completeness, we will look at some of the consequences of the two definitions.

## B. CONSEQUENCES OF BROAD DEFINITION

Defendant argues that defining "personal injury" to include intangible harm would result in civil rights or wrongful termination actions being brought in comp court. This farfetched fear has not been borne out in practice, for a number of reasons

1. The recoverability of noneconomic damages in civil rights actions, but not under the WDCA, is a strong incentive to pursue such claims as civil rights actions and not as workers compensation claims. Whether such claims are "personal injuries" subject to the WDCA's exclusive remedy provision is immaterial, since the statutes creating the civil rights remedies override the WDCA. *Boscaglia v Michigan Bell Telephone*, 420 Mich 308, 316 (1984).

2. To the extent that a wrongful termination claim is based on *breach of contract*, it would not be cognizable as a worker's compensation claim, because "personal injury" and "breach of contract" have traditionally been understood to be distinct wrongs.

3. Mental upset arising *because of* a termination is not compensable under the WDCA, because not arising "in the course of" the employment. *Robinson v Chrysler Corp*, 139 Mich App 449, 451 (1984). Since most termination cases involve only post-termination upset, they cannot be prosecuted under the workers compensation act.

4. That leaves a class of cases where there is indeed overlap: employment harassment claims that cause pre-termination mental upset severe enough to be disabling. Although such cases theoretically can be prosecuted both as civil rights and as

compensation claims, in practice the added cost of pursuing claims in two fora leads the worker to pursue the one claim that offers the best chance of obtaining a recovery.

5. Even if there is a tiny class of employment/civil rights cases that might be brought in two fora, so what? This is hardly unprecedented, and coordination of benefits provisions preclude any unjust enrichment. See WDCA 827, which expressly authorizes tort suits, and gives the comp carrier a lien on such recoveries.

Finally, Defendant's argument overlooks that fact that the Worker's Compensation Act has covered nontangible injuries for 80 years now (since the *Klein* case in 1922) without the dire consequences it claims would result.

### C. CONSEQUENCES OF NARROW DEFINITION

On the other hand, there are some untoward consequences of overthrowing the established view of personal injury to require tangible injuries:

1. As noted in Part V, it would render WDCA 301(2)'s provision for compensability of neuroses a dead letter, contrary to the rule that statutes should be construed to effectuate all parts.

2. Since the pathological/symptomatic distinction exists nowhere in the statute, the courts would have to determine *what the Legislature meant* by *words the Legislature didn't use*; an obvious impossibility. This also highlights the fact that creation of a pathological/symptomatic distinction would be judicial legislation.

3. There is no medical nor logical basis for drawing a line between pathology and symptoms. Consider cases like *Sherman* and *Curley*, both of which involved irritation of body tissues. Was the rash in *Sherman* a symptom or a pathological change? How about the shortness of breath in *Curley*?[28]

Consider also syncope cases like *Cazan* and *Rainko*. Here again, something went on physiologically to cause the plaintiffs to pass out. Are those changes "pathology" or mere symptoms? That the physiological changes left no lasting scars does not render it any less disabling while it lasted. Consequently, there is no principled basis to deny compensation in such cases.[29]

The simple fact is that disabling conditions exist on a continuum, with gross trauma on one end, blending imperceptibly into microscopic or invisible physiological changes[30] (which may in turn be long-lasting or short-lived), and ending with zero trauma (neuroses) at the other end. Since there is no principled basis to label one type of

---

[28] Whether the physiological change is visible (as in *Sherman*) or invisible (as in *Curley*) is neither a logical nor statutorily supported basis of distinction.

[29] Unless we invent a "long-lasting" requirement which, apart from being unsupported by the language of the Act (which expressly recognizes that temporarily disabling conditions may be compensable) would create problems of its own. For instance, how long a duration would be long enough?

[30] Becoming ever more visible as diagnostic technology improves. Consider the MRI, which shows soft-tissue injury that could only be inferred before. However, despite these advances, no one has yet determined how to take a picture of pain.

physiological change "pathological" and the other "symptomatic," allowing cases to turn on such a distinction would result in judges applying their personal predilections to the question. The result would be inconsistent results and more litigation.

4. WDCA 301(1) is not the only place the Act uses the term "personal injury." That phrase is also used in WDCA 131(1):

> The right to the recovery of benefits as provided in this act shall be the employee's exclusive remedy against the employer for a personal injury...

Take the case of a worker subjected to severe emotional distress on the job. The employee cannot currently sue the employer in tort, since this is a "personal injury" as used in WDCA 131 (1). However, if "personal injury" were redefined to exclude nonphysical injury, employers would become subject to such tort liability.

## VII. APPLICATION OF LAW TO FACTS

An employer takes its employee as it finds him. When Plaintiff went to work for Defendant, he had a neck that was fused at C5-6 and arthritis in at least his cervical spine.[31] Nevertheless, Plaintiff was asymptomatic when he started work for Defendant.

---

[31] The cause of the arthritis was not clearly established. Treating Dr. Reichert simply called it "degenerative arthritis," which can be a disease process or traumatic in origin. *Renteria v Jackson Hillsdale Community Mental Health*, 1999 WCACO ____, 12 MIWCLR 1215 (No. 269, May 20). Dr. DeVries claimed it was a condition of the aging process, but the magistrate expressly rejected that defense examiner's credibility. There was no evidence of any specific event injury to the back or neck. On the other hand, normal spinal degeneration does not typically result in two damaged discs by age 50.

By contrast, after three years of work for Defendant (including computer work, which was the worst on Plaintiff's neck), Plaintiff had

- neck pain severe enough to require use of mind-numbing pain medication;
- damaged discs at C3-4 and C6-7; and
- pain and spondylolisthesis in the *lumbar* spine (at L5-S1).

Although the foregoing facts would permit an inference of physical worsening, the magistrate declined to draw that inference; but did find, as a fact, that the work for defendant worsened Plaintiff's symptoms to the point of disability, which continued through the date of trial.

As noted, "personal injury" as defined in the dictionaries and as elucidated by case law is not limited to physical injury, but encompasses intangible injury to feelings. Since that definition is broad enough to include the disabling pain found by the magistrate, the magistrate's finding of a "personal injury" must be affirmed.

The only arguable exception to the broad definition of personal injury is an "ordinary disease of life," which is excluded from WDCA 401's definition of "personal injury." In the case at bar, since no ordinary disease of life was found, and Defendant did not urge that as error on appeal, the ordinary disease of life exclusion from "personal injury" was not preserved as an issue. WDCA 861a(11) (WDCA may review only questions raised by the parties); *Weems v Chrysler Corp*, 201 Mich App 309, 316-317 (1993), aff'd on this point 448 Mich 679, 686, n. 5 (1995) (courts will not review questions

not first presented to the WCAC); *Matney v Southfield Bowl,* 218 Mich App 475, 487 (1996) (*Id.*).

## RELIEF REQUESTED

A full exposition of the law of "personal injury" would include consideration of diseases, and of the exclusion for "ordinary diseases of life." However, because there was no finding of a disease, and applicability of the latter exclusion was abandoned by Defendant's failure to raise it on appeal, anything the Court would say about personal injury vis-a-vis diseases (including vascular diseases and even disease-based arthritis) would be *dictum*.

In addition, in most "pain" cases, the pain either arises from a tangible physical injury, or develops gradually from a disease or repeated microtrauma. The case at bar does not fit into either paradigm because a) though there was no evidence that a specific event sparked Plaintiff's spinal degeneration, nor was there any clear diagnosis of a disease; and b) a specific event injury did intervene: the cervical fusion which physically changed Plaintiff's neck (and which, from a legal standpoint, muddied the waters with respect to "condition of the aging process" and "ordinary disease of life"). Because of the atypical facts of this case, whatever rules of law the Court enunciates would be *dictum* as to most workers compensation cases.

Since the Court's time is better spent making holdings that apply to more than exceptional cases, leave should be denied as improvidently granted.

If the Court does decide the case on the merits, accepting Defendant's proposed definition of "personal injury" would require us to

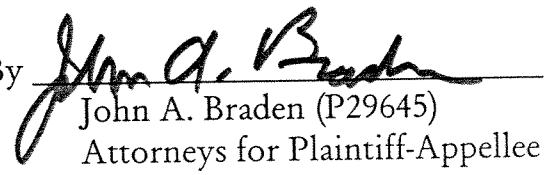
- throw out three out of four dictionaries, and several of the definitions in the remaining dictionary;
- construe a remedial statute in a niggardly way; and
- overrule a long line of cases, stretching back much further than *Carter*.

Since that would plainly be unreasonable, Defendant's definition should be rejected, and the lower tribunals affirmed.

Respectfully submitted,

LIBNER, VanLEUVEN, EVANS,
PORTENGA & SLATER, P.C.

DATED: March 7, 2003

By 
John A. Braden (P29645)
Attorneys for Plaintiff-Appellee

MICHIGAN SUPREME COURT CASES
ALLOWING WORKERS COMPENSATION
FOR NONTRAUMATIC INJURIES

*Excepting stress-induced heart attacks. Note that, in every case except Sherman, the injuries were invisible*

| CASE | CONDITION | NATURE OF INJURY | DURATION |
|---|---|---|---|
| *Sherman*, 262 Mich 214 | Irritated skin (allergic rash) | visible | ? |
| *Curley*, 278 Mich 23 | Irritated lungs (bronchitis) | tangible | ? |
| *Cazan*, 279 Mich 86 | syncope from carbon monoxide | "mere" physiological change | temporary |
| *Rainko*, 306 Mich 328 | syncope from fumes, hysteria | "mere" physiological change | temporary |
| *Klein*, 217 Mich 485 | neurosis | intangible | continuing |
| *Carter*, 361 Mich 577 | neurosis | intangible | continuing |
| *Deziel*, 403 Mich 1 | neurosis | intangible | continuing |
| *Blaess*, 195 Mich 137 | infectious disease | tangible results | |
| *Dove*, 198 Mich 132 | infectious disease | tangible results | |
| *Frankamp*, 222 Mich 525 | infectious disease | tangible results | |
| *Carvey*, 218 Mich 342 | stroke | tangible results; "mere" physiological change | continuing |
| *Beaty*, 245 Mich 256 | "the bends" | "mere" physiological change | fatal |